

**PUBLIC SERVICE COMMISSION  
OF WEST VIRGINIA  
CHARLESTON**

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA  
in the City of Charleston on the 7<sup>th</sup> day of October 2024.

CASE NO. 23-0010-S-DU

**HUBBARD HEIGHTS SUBDIVISION HOMEOWNERS ASSOCIATION**

Petition for Determination that Hubbard Heights  
Subdivision Homeowners Association is a Distressed  
or Failing Utility under W. Va. Code § 24-2H-1, et seq.

**COMMISSION ORDER**

The Commission denies exceptions filed by the Huntington Sanitary Board  
and adopts the Recommended Decision as a Final Order of the Commission.

**BACKGROUND**

On January 5, 2023, Tim Dillon filed a petition for determination that the  
Hubbard Heights Subdivision Homeowner's Association (Hubbard Heights) is a  
distressed or failing utility.

On March 8, 2023, the Administrative Law Judge's (ALJ) procedural order  
named the Town of Ceredo as a respondent. On March 9, 2023, the ALJ's  
procedural order named Northern Wayne County Public Service District, Kenova  
Municipal Sewer, Spring Valley Public Service District, and the Sanitary Board of  
the City of Huntington (Huntington) as respondents. On September 25, 2023, a  
procedural order adding West Virginia-American Water Company (WVAWC) was  
issued.

On April 5, 2023, Staff filed its Final Joint Staff Memorandum. Staff found  
the current physical state of the collection and treatment system to be in a failed  
and non-functioning condition. Staff reported that there is no active Board, no  
licensed Operator, no Asset Management Plan and the utility meets the definition  
of a failing utility.

On March 25, 2024, Staff filed a letter standing by its recommendation that  
Hubbard Heights is a failed utility.

On April 12, 2024, the ALJ issued a Recommended Decision determining that Hubbard Heights is a failing utility. The ALJ further determined that Huntington is the most suitable capable utility.

On April 26, 2024, Huntington filed exceptions asserting (i) the Commission does not have jurisdiction because it is likely that Hubbard Heights has fewer than twenty-nine customers, (ii) the ALJ erred by failing to consider the proximity of Huntington to Hubbard Heights, financial impacts on Huntington, the availability of public funding, and other factors.

On May 6, 2024, Staff filed a reply in opposition to the exceptions. Staff argued (i) the Commission has jurisdiction, (ii) the ALJ considered proximity, financial impacts on Huntington, and the availability of public funding, and (iii) that the other factors will be addressed when Staff and Huntington formulate a plan as required by the Recommended Decision.

### **DISCUSSION**

In 2020, the West Virginia Legislature enacted W. Va. Code § 24-2H-1, et seq. (the Act) and thereby authorized the Commission to protect the consumers of distressed and failing water and wastewater utilities by ordering various corrective measures up to and including acquisition of a failing utility by a capable water or wastewater utility to ensure safe drinking water and adequate and safe wastewater treatment. The Legislature found that “the provision of safe drinking water and the collection and treatment of wastewater has resulted in a drastic reduction in the incidence of disease, increase in life expectancy, and other major public health advancements.”<sup>1</sup>

The Legislature further found that many water and wastewater utilities operating in the state have suffered “a loss of customers resulting from decline in populations served.”<sup>2</sup> The failure to maintain water and wastewater systems has resulted in utilities which are unable “to adequately serve customers and maintain regulatory compliance, thereby threatening human health and hindering economic growth.”<sup>3</sup>

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<sup>1</sup> W. Va. Code § 24-2H-2(a)

<sup>2</sup> Id. at (e)

<sup>3</sup> Id. at (f).

## The Commission Has Jurisdiction Over Hubbard Heights

Huntington argues the Commission does not have jurisdiction over Hubbard Heights, because there is no evidence "Hubbard Heights serves 25 or more 'billed entities.'"<sup>4</sup> The Commission's jurisdiction shall "extend to all public utilities in this state and includes any utility engaged in any of the following public services: ...sewer systems servicing 25 or more persons or firms other than the owner of the sewer systems."<sup>5</sup>

The Supreme Court of Appeals of West Virginia held that "jurisdiction of the Public Service Commission over a public utility will not be considered to be terminated unless the action of the commission and the circumstances surrounding the case demonstrate clearly and unequivocally its intent to relinquish such jurisdiction."<sup>6</sup>

In Case No. 13-0140-S-C and Case No. 13-0287-S-C, the Commission dismissed the cases for lack of jurisdiction, because the Country Lane Mobile Home Park had less than twenty-five customers.<sup>7</sup> Unlike the facts presented in this case, the Country Lane Mobile Home Park was not being regulated by the Commission when the complaint was filed.<sup>8</sup> Country Lane Mobile Home Park was already below the necessary twenty-five billed entities when the complaints were filed.

The Commission has previously exercised its jurisdiction over Hubbard Heights. In Case No. 01-1108-S-CN, Hubbard Heights filed an application for a certificate of convenience and necessity to operate and maintain a sewer system. At that time, Hubbard Heights had 27 sewer customers.<sup>9</sup> The certificate was granted in the case.<sup>10</sup> The Commission had proper jurisdiction when the certificate

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<sup>4</sup> Exceptions at Bates 5.

<sup>5</sup> W. Va. Code § 24-2-1(a).

<sup>6</sup> Boggs v. Public Serv. Comm'n, 154 W.Va. 146, 174 S.E.2d 331, 1970 W. Va. LEXIS 182 (W. Va. 1970).

<sup>7</sup> Bruce Schoolcraft v. Tyrone Tuel, Owner, Country Lane Mobile Home Park, Case No. 13-0140-S-C, Final Order at 2, March 29, 2013, and Gary F. and Veneca R. Burdick v. Tyrone Tuel, Owner, Country Lane Mobile Home Park, Case No. 13-0287-S-C, Final Order at 2, April 16, 2013.

<sup>8</sup> Case No. 13-0140-S-C Initial and Final Memorandum Engineering Division at 2, March 18, 2013.

<sup>9</sup> Hubbard Heights Subdivision Homeowners Association, Case No. 01-1108-S-CN, Recommended Decision at 3, May 15, 2002.

<sup>10</sup> Id. at 4.

was granted, and that jurisdiction has not been terminated. Accordingly, Huntington's exception based on jurisdiction is denied.

#### Proximity Is Not the Sole Determinate of a Capable Proximate Utility

Huntington asserted the ALJ failed to consider the proximity of Huntington to Hubbard Heights.<sup>11</sup> A capable proximate water or wastewater utility is "a public utility which regularly provides adequate, safe, and reasonable service of the same type as the distressed utility and is situated close enough to the facilities of a distressed utility that operational management is reasonable, financially viable, and nonadverse to the interests of the current customers of the nondistressed utility."<sup>12</sup>

Staff's witness Brandon Crace, Engineering Division, testified that Northern Wayne County Public Service District appears to be the closest utility.<sup>13</sup> However, neither W. Va. Code § 24-2H-5(b)(2) nor W. Va. Code § 24-2H-3(c) state that the capable proximate utility must be the closest geographically.<sup>14</sup> West Virginia Code §24-2H-3(c) provides that the capable proximate utility be "close enough" to be "reasonable, financially viable, and nonadverse" to the customer's interests.

Huntington's location was considered in the Recommended Decision. The ALJ noted Huntington "is located within a few miles of Hubbard."<sup>15</sup> Staff's witness Robert Cadle, Utilities Division, testified Huntington's sewer plant is visible from Hubbard Heights.<sup>16</sup> In Case No. 21-0066-PSD-DU, the Commission ordered WVAWC to acquire the distressed utility, even though it was the furthest away, due to the financial, managerial, technical abilities, staffing resources, and prior experience.<sup>17</sup> Based on the foregoing, Huntington's exception that the ALJ failed to consider proximity is denied.

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<sup>11</sup> Exceptions at Bates 7.

<sup>12</sup> W. Va. Code § 24-2H-3(c).

<sup>13</sup> Hearing Transcript at 61, July 25, 2023.

<sup>14</sup> W.Va. Code § 24-2H-5(b)(2) provides that the Commission shall consider "expansion of the franchise or operating area of the acquiring utility to include the service area of the distressed utility."

<sup>15</sup> Recommended Decision at 23.

<sup>16</sup> Hearing Transcript at 123, February 22, 2024.

<sup>17</sup> Boone-Raleigh Public Service District, Boone County Commission, Boone County Public Service District, Bradley Public Service District and West Virginia-American Water Company, Case No. 21-0066-PSD-DU, Commission Order at 5, August 3, 2022.

## Financial Impact May Be Addressed Through Rates and Pursuit of Public Funding

Huntington argued that the ALJ did not consider the financial impact on Huntington.<sup>18</sup> The Recommended Decision noted “Huntington has the ability to spread the costs it incurs over a relatively large customer base,” and “unlike WVAWC, Huntington has access to public funding.”<sup>19</sup> Huntington’s witness, Brian Bracey, testified that Huntington serves “a little over 20,000” customers.<sup>20</sup> Staff’s witness, Robert Cadle, Utilities Division, testified Huntington has the option to raise rates, and pass the increased costs to its resale customers.<sup>21</sup>

Cost recovery mechanisms provided under W. Va. Code § 24-2H-9 include, “(1) [a] surcharge above existing rates that allows recovery of additional incremental cost increases, net of contributions necessary to operate, maintain and improve the failing utility’s service level to an acceptable level and into compliance with all applicable regulatory standards; (2) [a]n acquisition adjustment to private for-profit utilities as an incentive to acquire a failing utility; (3) [a]n increased return on investment as an incentive to acquire a failing utility; or (4) [a]ny other incentive method proposed by the acquiring utility if the method is determined by the commission to be appropriate, reasonable and in the public interest.”

The Act gives the Commission the authority to order the acquisition of a failing utility by a capable proximate utility.<sup>22</sup> The purpose of the Act is to “ensure that all citizens of West Virginia have access to safe drinking water and adequate and safe wastewater treatment.”<sup>23</sup> In order to ensure the remaining citizens of Hubbard Heights have access to safe wastewater treatment, Huntington and Staff will formulate a plan for acquisition. Although Huntington objects on grounds that it can’t raise rates without City Council’s approval, the Commission expects that if a rate increase is necessary, City Council will appreciate the interests of the public and the local economy in access to safe, reliable wastewater treatment service and co-operate with a plan to be developed by Huntington with the assistance of Staff.<sup>24</sup>

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<sup>18</sup> Exceptions at Bates 8.

<sup>19</sup> Recommended Decision at 23, April 12, 2024.

<sup>20</sup> Hearing Transcript at 118, July 25, 2023.

<sup>21</sup> Hearing Transcript at 124 and 125, February 22, 2024.

<sup>22</sup> W. Va. Code § 24-2H-7(a).

<sup>23</sup> W. Va. Code § 24-2H-2(g).

<sup>24</sup> Hearing Transcript at 126, February 22, 2024.



Huntington argued the ALJ failed to consider the availability of public funds.<sup>25</sup> Under W. Va. Code § 24-2H-8(e), "a nonprofit acquiring public utility may seek grant funding from the Distressed Utilities Account established pursuant to §31-15A-9(i) of this code to repair, maintain, and replace the distressed water and wastewater utilities facilities as needed. The reasonably and prudently incurred costs of the acquiring utility shall be recoverable in rates as provided in §24-2H-9 of this code." The Recommended Decision recognized that as a political subdivision of the State, Huntington "has access to public funding."<sup>26</sup> Huntington asserted that the five million dollars of grant funding is not available due to WVJDC Project Nos. 2021W-1982 and 2021S-1980 and Case No. 20-1033-WS-DU.<sup>27</sup> The Commission understands that applying for and receiving funds from the Distressed Utilities Account may take time. The Commission encourages Huntington to work with Staff to identify and secure other sources of funding.

#### The Commission Has Statutory Authority to Order the Acquisition

The Commission has the authority to order the acquisition of a failing utility by the most suitable capable proximate utility under W. Va. Code § 24-2H-7(a).<sup>28</sup> West Virginia Code §24-2H-8 further gives the Commission the authority to approve the necessary operating agreement and the purchase price of the acquisition. The Commission has the authority to approve "an appropriate and reasonable cost recovery mechanism to allow the capable proximate utility to recover its acquisition costs."<sup>29</sup> The Commission has the authority to order Huntington to acquire Hubbard Heights. Accordingly, Huntington's exception based on authority is denied.

#### Huntington and Staff Will Work Together to Develop and Implement a Plan

The Recommended Decision ordered that "Huntington work with Staff to develop and implement a plan to acquire Hubbard assets and resume

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<sup>25</sup> Exceptions at Bates 9.

<sup>26</sup> Recommended Decision at 23.

<sup>27</sup> Exceptions at 9.

<sup>28</sup> W. Va. Code § 24-2H-7(a) "If the commission determines that the utility is a failing utility, then the commission may order the acquisition of the failing utility by the most suitable capable proximate water or wastewater utility, if there is more than one."

<sup>29</sup> W. Va. Code § 24-2H-9.

operations.”<sup>30</sup> The other factors listed in Huntington’s exceptions<sup>31</sup> are items that can be addressed in formulating the plan with Staff. Huntington’s exception is denied.

### Use of Home Aeration Units

Huntington argued that the remaining Hubbard Heights customers should install home aeration units.<sup>32</sup> Huntington is not willing to help convert the remaining customers.<sup>33</sup> The home aeration units were discussed at the evidentiary hearings. Staff witness, Brandon Crace, testified that each homeowner will need to obtain a National Pollutant Discharge Elimination System (NPDES) permit, and that each homeowner would be liable for all sewage.<sup>34</sup> This option does not solve the issue at hand. Staff witness, Robert Cadle, testified a utility would still have to monitor the system to ensure compliance.<sup>35</sup> The Recommended Decision considered alternatives and found none were feasible.<sup>36</sup> Accordingly, Huntington’s exception is denied.

### The Commission Adopts the Recommended Decision as a Final Order

The Commission has been authorized under the Act to “ensure that all citizens of West Virginia have access to safe drinking water and adequate and safe wastewater treatment.”<sup>37</sup> The Recommended Decision found Huntington to be the most suitable capable proximate utility as it “serves considerably more sewer customers than any other surrounding utility and has more available administrative and sewer field personnel than any other respondent in that area. Huntington also has the ability to spread the costs it incurs over a relatively large customer base. Further, unlike WVAWC, Huntington has access to public funding.”<sup>38</sup>

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<sup>30</sup> Recommended Decision at 28.

<sup>31</sup> Other factors include: (i) acquiring property rights for the ponds, and (ii) status of permits. Exceptions at Bates 10.

<sup>32</sup> Id. at Bates 11.

<sup>33</sup> Id. at Bates 12.

<sup>34</sup> Hearing Transcript at 99, February 22, 2024.

<sup>35</sup> Id. at 132 and 133.

<sup>36</sup> Recommended Decision at 23 and 24.

<sup>37</sup> W. Va. Code § 24-2H-2(g).

<sup>38</sup> Recommended Decision at 23.

Huntington has around 44 field employees.<sup>39</sup> The City of Kenova has three employees.<sup>40</sup> The Town of Ceredo employs one primary employee and one employee that moves between departments.<sup>41</sup> Northern Wayne employs 6 field employees.<sup>42</sup> None of Kenova, Ceredo, and Northern Wayne have the personnel necessary to acquire Hubbard Heights. WVAWC's closest wastewater operation is eighty miles away from Hubbard Heights, and it does not have access to public funding.<sup>43</sup>

Based on the foregoing, the Commission agrees with the Recommended Decision that Huntington is the most capable proximate utility. The Commission will deny the exceptions and adopt the Recommended Decision as the Final Order of the Commission.

### **FINDINGS OF FACT**

1. On April 12, 2024, the ALJ issued a Recommended Decision determining that Hubbard Heights is a failing utility. The ALJ further determined that Huntington is the most suitable capable utility.

2. On April 26, 2024, Huntington filed exceptions asserting (i) the Commission does not have jurisdiction because it is likely that Hubbard Heights has less than twenty-five customers, (ii) the ALJ erred by failing to consider proximity of Huntington to Hubbard Heights, financial impacts on Huntington, the availability of public funding, and other factors.

3. On May 6, 2024, Staff filed a reply in opposition to the exceptions.

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<sup>39</sup> Hearing Transcript at 118 and 123, July 25, 2023.

<sup>40</sup> Hearing Transcript at 134, July 25, 2023.

<sup>41</sup> Hearing Transcript at 111, July 25, 2023.

<sup>42</sup> Direct Testimony at Bates 16.

<sup>43</sup> Initial Brief of West Virginia-American Water Company at Bates 5, March 25, 2024.



## CONCLUSIONS OF LAW

1. The Commission's jurisdiction "shall extend to all public utilities in this state and shall include any utility engaged in any of the following public services: ...sewer systems servicing 25 or more persons or firms other than the owner of the sewer systems."<sup>44</sup>

2. The Supreme Court of Appeals of West Virginia held that "jurisdiction of the Public Service Commission over a public utility will not be considered to be terminated unless the action of the commission and the circumstances surrounding the case demonstrate clearly and unequivocally its intent to relinquish such jurisdiction."<sup>45</sup>

3. A capable proximate water or wastewater utility is "a public utility which regularly provides adequate, safe, and reasonable service of the same type as the distressed utility and is situated close enough to the facilities of a distressed utility that operational management is reasonable, financially viable, and nonadverse to the interests of the current customers of the nondistressed utility."<sup>46</sup>

4. Cost recovery mechanisms provided under W. Va. Code § 24-2H-9 include, "(1) [a] surcharge above existing rates that allows recovery of additional incremental cost increases, net of contributions necessary to operate, maintain and improve the failing utility's service level to an acceptable level and into compliance with all applicable regulatory standards; (2) [a]n acquisition adjustment to private for-profit utilities as an incentive to acquire a failing utility; (3) [a]n increased return on investment as an incentive to acquire a failing utility; or (4) [a]ny other incentive method proposed by the acquiring utility if the method is determined by the commission to be appropriate, reasonable and in the public interest."

5. Under West Virginia Code § 24-2H-8(e), "a nonprofit acquiring public utility may seek grant funding from the Distressed Utilities Account established pursuant to §31-15A-9(i) of this code to repair, maintain, and replace the distressed water and wastewater utilities facilities as needed. The reasonably and prudently incurred costs of the acquiring utility shall be recoverable in rates as provided in §24-2H-9 of this code."

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<sup>44</sup> W. Va. Code § 24-2-1(a).

<sup>45</sup> Boggs v. Public Serv. Comm'n, 154 W.Va. 146, 174 S.E.2d 331, 1970 W. Va. LEXIS 182 (W. Va. 1970).

<sup>46</sup> W. Va. Code § 24-2H-3(c).

6. The Commission has the authority to order the acquisition of a failing utility by the most suitable capable proximate utility under W. Va. Code § 24-2H-7(a).

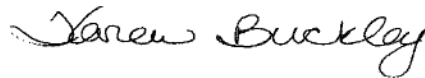
### **ORDER**

IT IS THEREFORE ORDERED that the exceptions filed by Huntington Sanitary Board on April 26, 2024 are denied. The April 12, 2024 Recommended Decision is adopted as a Final Order of the Commission.

IT IS FURTHER ORDERED that upon entry of this Order this case shall be removed from the Commission docket of open cases.

IT IS FURTHER ORDERED that the Executive Secretary of the Commission serve a copy of this Order by electronic service on all parties of record who have filed an e-service agreement, and by United States First Class Mail on all parties of record who have not filed an e-service agreement, and on Commission Staff by hand delivery.

A True Copy, Teste,

A handwritten signature in cursive script that reads "Karen Buckley".

Karen Buckley, Executive Secretary

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